Supreme Court, U.S.
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NO. 92-552

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOE ALLEN BAKER, M.D.,

Petitioner,

v.

GULF + WESTERN INDUSTRIES, INC.,
GULF + WESTERN FOOD PRODUCTS CO.,
RISK MANAGEMENT SERVICES, INC.,
and FRANK B. HALL, INC.,

Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether Respondents Can Dispute Facts When the Court Below Granted Summary Judgment Based Upon an Erroneous View of the Law?

B. Whether this Court Should Resolve the Split Among the Courts of Appeals Regarding the Retroactive Application of the Civil Rights Act of 1991?

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REPLY TO BRIEFS IN OPPOSITION

I. RESPONDENTS SHOULD NOT NOW BE ALLOWED TO ARGUE FACTUAL QUESTIONS WHICH MUST BE RESOLVED AGAINST THEM ON A MOTION FOR SUMMARY JUDGMENT

Respondents Gulf + Western Industries, Inc. and Gulf + Western Food Products, Co. devote much of their Brief in Opposition to re-urging factual differences among the parties. Not only is such argument immaterial; it is unnecessarily inflammatory and does little to help this Court decide whether to exercise jurisdiction over the difficult issues presented in the Petition.

It is well-established that on a motion for summary judgment, the district court must resolve any disputed issues of material fact in favor of the non-movant. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,

587-88 (1986), citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Appellate review of grants of summary judgment employ the same standard. That is, a reviewing court's standard of review is de novo. See generally 1 S. CHILDRESS & M. DAVIS, FEDERAL STANDARDS OF REVIEW § 5.02 nn. 9-11 (2d edn. 1992) (collecting cases).

Thus, Gulf + Western is patently incorrect, insofar as summary judgment is involved, when it argues that "it is the province of the courts below to determine the existence of disputed material issues rather than the traditional role of this Court on certiorari." See Gulf + Western Brief in Opposition at 3.

This Court should apply the traditional de novo standard, and resolve all disputed material facts in

favor of Respondent Dr. Baker. In so doing, this Court should disregard the immaterial assertions upon which Gulf + Western relies so heavily. See, e.g., Gulf + Western Brief in Opposition at 3 ("Perceived Misstatements of Fact"). All those "misstatements" must be resolved in favor of Dr. Baker -- the non-movant below.

II. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE COURTS OF APPEALS REGARDING THE RETROACTIVITY OF THE CIVIL RIGHTS ACT OF 1991

A. This Court Has the Power to Decide the Issue of Retroactive Application, Even Though it Was Not Presented Below

It is clear that this Court may consider questions which have not been raised below. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697 (1984); Cuyler v. Sullivan, 466 U.S. 335 (1980);

Youakim v. Miller, 425 U.S. 231, 234 (1976). Although this Court generally declines to decide issues not presented below, that rule is prudential only; there is no jurisdictional bar to this Court reaching them. City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 259 (1987). See also Carlson v. Green, 446 U.S. 14, 17 n.2 (1980).

Furthermore, the rule is not inflexible. Capital Cities, 467 U.S. at 697. This Court has not hesitated to address issues not passed upon below, especially when, as is the case here, an important question is involved and "the issue is squarely presented and fully briefed." Carlson, 466 U.S. at 17 n.2.

Even when an issue has not been discussed in the petition for certiorari, this Court has reserved the power to address the new issue in

appropriate circumstances. See, e.g., McCleskey v. Zant, 499 U.S. ---, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); Arcadia, Ohio v. Ohio Power Co., 498 U.S. 73, ---, 111 S.Ct. 415, 418 (1990); Capital Cities, 467 U.S. at 697-98; Vance v. Terrazas, 444 U.S. 252, 258 n.5 (1980); Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 319-21 (1971). See generally R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE § 6.26 (6th edn. 1986).

Cases presenting "appropriate circumstances" have generally involved one or more of the following factors: (1) origination in federal court as opposed to state court; (2) interpretation of federal law rather than state law; (3) the presence of sufficient facts in the Record to allow for a fair and intelligent decision on

the new issue; (4) the opportunity for opposing parties to present briefs on the new issue; and (5) the relevance of the new issue to an intelligent resolution of the case. See generally R. STERN, E. GRESSMAN & S. SHAPIRO, supra, §§ 3.24, 6.25, 6.26. All of the foregoing factors are present in this case. Thus, this Court should address the issue of the retroactivity of the Civil Rights Act of 1991.

Several other factors also weigh in favor of this Court's consideration of the retroactivity of that Act. Assertion of the issue below would be an exercise in futility; a decision by this Court on the merits will serve the interest of judicial administration. Remanding to the Eleventh Circuit would be futile. That court recently held that the Civil Rights Act of 1991

applies only prospectively. Baynes v. A T & T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992). Thus, any argument on this issue before the Eleventh Circuit would be futile for Petitioner; if this case were remanded, the Eleventh Circuit unquestionably would resolve the issue in favor of Respondents. Then, Petitioner could once again petition for certiorari. The interests of judicial economy clearly would be advanced by this Court's resolving the issue on its merits. Thus, granting certiorari at this time would avoid the enormous expense and delay that would occur if this case were merely remanded.

B. There is Clearly a Split Among the Courts of Appeals on the Issue of the Retroactive Application of the Civil Rights Act of 1991

Since the filing of the Petition in this action, the Ninth Circuit has held that the Civil Rights Act of 1991 is retroactive. Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992). Other Circuits have held that the Act is not retroactive. See Baynes, 976 F.2d 1370 (11th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992).

Because of this clear split among the Courts of Appeal regarding the retroactivity of the Civil Rights Act of 1991, this Court should grant the

Petition in the instant action to resolve this important issue of federal law.

CONCLUSION

For the foregoing reasons and for the reasons contained in the Petition, this Court should issue a writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit, and order full briefing and oral argument on the merits of this case.

Respectfully Submitted,

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